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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1961.

No. 205

OZARK DAIRY COMPANY, a Corporation, and JOHN BRAUCH, an Individual, d b a Cool Valley Dairy,
Petitioners,
vs,
ADAMS DAIRY COMPANY, a Corporation; ADAMS DAIRY INC., a Corporation; THE GREAT ATLANTIC & PACIFIC TEA COMPANY, INC., a Corporation; NATIONAL DAIRY PRODUCTS CORPORATION, a Corporation; ACF-WRIGLEY STORES, INC., a Corporation; THE KROGER COMPANY, a Corporation; SCHNUCK MARKET DELLWOOD, INC., a Corporation; SCHNUCK MARKET FLORISSANT, INC., a Corporation; SCHNUCK MARKET OVERLAND, INC., a Corporation; SCHNUCK MARKETS BRENTWOOD, INC., a Corporation; SCHNUCK MARKETS MANCHESTER, INC., a Corporation;
Respondents.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit.

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INDEX.

	Page
Petition	1
Statement of the grounds on which jurisdiction of this court is invoked	2
Concise statement of the case containing the facts material to the consideration of the questions presented	4
Argument amplifying the reasons relied on for allowance of the writ	8
Mandamus proper remedy	9
Conclusion	11
Appendix A—Partial transcript of proceedings on plaintiffs' request for a jury trial	13
Appendix B—Denial of leave to file petition for mandamus	20
Appendix C—Motion for leave to file petition for mandamus	21
Appendix D—Petition for mandamus	22

Cases Cited.

Beacon Theatres, Inc. v. Westover, 359 U. S. 500, decided May 25, 1959 (Dist. Ct. for the Southern Dist. of California and Court of Appeals for the Ninth Circuit reversed)	9
Bereslavsky v. Kloeb, 162 F. 2d 862 (Circuit Court of Appeals, 6th Circuit, June 30, 1947)	10

Canister, et al. v. Leahy, et al., 191 F. 2d 255 (CCA 3), decided 1951, certiorari denied 1951, 342 U. S. 893, 96 L. Ed. 669, 72 S. Ct. 201, ... 9

Dimick v. Schiedt, 293 U. S. 474, 486 ..... 9, 11

Ex Parte Fahey, 332 U. S. 258, 259 10

Statutes and Rules Cited.

15 U. S. C. A., Sections 1-4 8
15 U. S. C. A., Sections 12-27 8
28 U. S. C. A., Section 1651 ..... 3, 10
Rules of Civil Procedure:
Rule 38 (a) 11
Rule 38 (b) 3, 4, 6, 8, 10
Rule 42 (b) 9
Rule 57 (c) 9

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PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals for the Eighth Circuit.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioners, Ozark Dairy Company, a corporation, and John Brauch, an individual, doing business as Cool Valley Dairy, respectfully petition this Court to grant a writ of certiorari to the United States Court of Appeals

for the Eighth Circuit, and to remove therefrom to this Court for review the record of the case lately pending therein, being No. Misc. 165 entitled In the Matter of the Ozark Dairy Company, a corporation, and John Branch, an individual, d/b/a Cool Valley Dairy, Petitioners, Motion for Leave to File Petition for Mandamus, which motion was denied by the said Court of Appeals on June 8, 1962.

There are no official or unofficial reports. Petitioners are attaching hereto as Appendix A the transcript notes of the Honorable Roy W. Harper, Judge of the United States District Court for the Eastern District of Missouri, Eastern Division, on May 18, 1962, together with the proceedings in Cause No. 58 C 447 (1), wherein your petitioners are plaintiffs and Adams Dairy Company, a corporation, and others are defendants. In said Cause No. 58 C 447 (1) your petitioners demanded a jury trial, which was denied by said District Court, and the application in the said Court of Appeals for mandamus followed.

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED.

Petitioners claim that they have been deprived of their constitutional right to a trial by jury.

The date of the judgment or order of the United States Court of Appeals denying the motion of petitioners for leave to file a petition for a writ of mandamus directed to the Honorable Roy W. Harper is June 8, 1962, and the time of its entry is likewise June 8, 1962.

(A copy of the order of the Court of Appeals is attached hereto as Appendix B.)

The trial court, the Honorable Roy W. Harper presiding, has agreed to continue the case pending in his court, No. 58 C 447 (1) for a reasonable time, sufficient to give peti-

tioners time to apply to this Court for a writ of certiorari; therefore it was unnecessary to petition the Court of Appeals for an extension of time within which to file the petition for the writ.

The statutory provision believed to confer on this Court jurisdiction to review the order or judgment of the Court of Appeals, in question, by a writ of certiorari is 28 U. S. C. A., Section 1651.

The question presented for review is the right of the petitioners to have a trial by jury, where a jury originally was not demanded by plaintiffs, but where after a lapse of two years or more, amended answers were filed by leave of Court by all the defendants except defendant National Dairy Products Corporation, some of which amended answers set up new issues; and then petitioners within the 10-day period under Rule 38 (b) of the Rules of Civil Procedure, made a demand for a jury trial in compliance with the said rule. Prior to the time that these amended answers were filed, depositions of the said defendants, other than National Dairy Products Corporation, were taken by the plaintiffs, and no questions were asked of these defendants regarding these affirmative defenses, since they were not pleaded and were not issues so far as these defendants were concerned.

The constitutional provision which is involved is the Seventh Amendment to the Constitution of the United States which reads as follows:

"Amendment VII—Civil Trials.

"In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

Also involved is Rule 38 (b) of the Federal Rules of Civil Procedure which reads as follows:

> "Rule 38. Jury Trial of Right.
>
> "(b) Demand. Any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefor in writing at any time after the commencement of the action and not later than 10 days after the service of the last pleading directed to such issue. Such demand may be indorsed upon a pleading of the party."

CONCISE STATEMENT OF THE CASE CONTAINING THE FACTS MATERIAL TO THE CONSIDERATION OF THE QUESTIONS PRESENTED.

This is an action brought in the United States District Court for the Eastern District of Missouri, Eastern Division, alleging violations of the anti-trust laws of the United States. The suit was originally filed on November 5, 1958, in four counts. Count Four was stricken by the trial judge, the Hon. Randolph Weber, now deceased. The complaint was amended by interlineation. Each of the three counts remaining allege damages in the sum of $1,048,241.19. The suit was filed by your petitioners as plaintiffs against Adams Dairy Company, Adams Dairy, Inc., Aro Dairy Company, National Dairy Products Corp., Pevely Dairy Company, Velvet Freeze Incorporated, ACF-Wrigley Stores, Inc., The Great Atlantic and Pacific Tea Company, Bettendorf-Rapp Produce Company, Bettendorf-Rapp Transportation Company, Betterdorf's Rapp's, Inc., The Kroger Company, A. Moll Grocer Company, National Food Stores, Inc., Rapp's Southtown Super Market, Inc., Rapp's Super Markets of Missouri, Inc., Schnuck Market Dellwood, Inc., Schnuck Market Florissant, Inc., Schnuck Market Overland, Inc., Schnuck Markets Brentwood, Inc., Schnuck Markets Manchester, Inc., and Tom Boy, Inc.

The plaintiffs on various dates voluntarily dismissed as to the defendants Velvet Freeze, Incorporated, Tour Boy, Inc., A. Moll Grocer Company, Pevely Dairy, National Food Stores, Inc., and Aro Dairy Company.

Originally, no demand for a jury trial was made by counsel then representing the plaintiffs. Present counsel representing the plaintiffs did not enter the case until January 19, 1962, after previous counsel had withdrawn.

The record shows that after various motions, the defendants all filed answers, and these answers remained on file more than two years, until early 1962. Then the trial judge, the Honorable Roy W. Harper, on Feb. 23, 1962 set the case for trial, on June 4, 1962.

After the trial date was set, all of the defendants who were then left in the case except National Dairy Products Corporation, on April 23, 1962, filed a motion asking permission to amend their answers, and said proposed amended answers were "lodged" with the Court, some of them pleading affirmative defenses to conform to the affirmative defenses in the answer theretofore filed by the defendant National Dairy Products Corporation, and also pleading the statute of limitations. Argument was requested.

The record shows: "May 4, 1962—joint motion of all defendants to amend answers argued and sustained and said answers heretofore 'lodged' are now ordered filed and are filed."

On May 4, 1962, the separate amended answer of the defendant Pevely Dairy Company was filed by leave; and on May 11, 1962 the separate amended answer of the defendant Kroger Company was filed by leave.

The amended answers filed by the defendants Adams Dairy, Inc., Adams Dairy Company, Aro Dairy Company and the Pevely Dairy Company embodied affirmative de-

fenses not theretofore pleaded by said defendants which are in words and figures substantially as follows, to-wit:

> "Any damages which the business or property of the Plaintiffs, or either of them, might have suffered, resulted directly from Plaintiffs' own wrongful actions in knowingly and willfully participating in, and in fact, instigating or being instrumental in instigating, the pricing pattern which they now complain of as having constituted a violation of the anti-trust laws. * * * That this defendant states that insofar as the Amended Complaint purports to assert a claim arising out of events or transactions which took place more than four (4) years immediately prior to the filing of this action, the said Amended Complaint is barred by the applicable statute of limitations."

On May 11, 1962 plaintiffs' demand for jury was filed and each of the defendants received a copy.

On May 15, 1962 the defendants filed a joint motion to strike the jury demand, and argument was requested.

On May 18, 1962 the record shows:

> **"Motion of defendants to strike plaintiffs' demand for jury trial heretofore filed is argued and submitted; leave heretofore granted to the defendants * * * to file amended answers is hereby withdrawn and said amended answers stricken; defendants' motion to strike plaintiffs' demand for jury trial is sustained."** (Emphasis ours.)

Your petitioners contended in the trial court that under Rule 38 (b) petitioners had a right to demand a jury trial within ten days after the filing of the last pleading which raised new issues, that is, within ten days after May 4, 1962 or May 11, 1962.

On Friday, May 25, 1962 at a pre-trial conference the petitioners, by counsel, again stated to the Court that they

were entitled to a jury trial and the Court again refused to consider the same, and stated that he would insist on hearing the trial beginning on June 4, 1962 without a jury.

On May 31, 1962 the petitioners prepared a Motion for Leave to File Petition for Mandamus, to which was attached a copy of the Petition for Mandamus and Petitioners' Suggestions in Support of Petition for Mandamus, and the same was duly filed in the United States Court of Appeals for the Eighth Circuit, and a copy served on each of the defendants, and also on the Honorable Roy M. Harper, Judge. (Copies of said Motion for leave to file Petition for Mandamus and Petition for Mandamus are hereto attached marked Appendix C and Appendix D.)

Counsel representing the parties were then notified by the Clerk of the said Court of Appeals that the matter had been set down for a hearing in the Court of Appeals on Friday, June 8, 1962 at 9:30 A. M. The matter was argued by counsel representing petitioners and by counsel representing the Kroger Company and the National Dairy Products Corporation, who were ostensibly also appearing on behalf of the Honorable Roy W. Harper, Judge. On the afternoon of the same day, the Clerk of the United States Court of Appeals notified counsel representing petitioners that the Court had handed down the following order:

> "June 8, 1962—Application for leave to file petition for mandamus denied." (See Appendix B.)

Thereupon, petitioners prepared and filed this petition for a writ of certiorari to review the holding and order of the said Court of Appeals.

THE FEDERAL QUESTION INVOLVED IN THE COURT OF FIRST INSTANCE, that is, in the United States District Court for the Eastern District of Missouri, Eastern Division, is the question of the right of petitioners to recover damages for violations of the Federal anti-

trust laws—15 U. S. C. A., Sections 1-4, inclusive, commonly known as the Sherman Act; 15 U. S. C. A., Sections 12-27, inclusive, commonly known as the Clayton Act. While the original petition asked for an injunction, the refusal of the trial Court on May 10, 1962 to allow the filing of a supplemental complaint, and the limitation placed on the plaintiffs to prove violations after November 5, 1958, ended the issue as to an injunction since the petitioners were not permitted to show any acts subsequent to November 5, 1958, which was the date of filing petitioners' complaint.

Thus the case at bar is based upon what took place between 1954 and 1958 and the only issues are of liability and damages.

ARGUMENT AMPLIFYING THE REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

The question of the right of trial by jury did not arise until after the amended answers were filed, as hereinbefore set out.

It is the position of the petitioners that the right to a jury trial having accrued on May 4, 1962 and on May 11, 1962, when the amended answers were filed by leave of Court, which was within ten days from the filing of the amended answers setting out new affirmative defenses, as to the defendants setting forth these new affirmative defenses, the said right to a trial by jury could not be circumvented by the Court by the expedient of withdrawing the order or leave authorizing the filing of the said amended answers, and then overruling the petitioners' demand for a jury trial. Petitioners believe that they are entitled to a jury trial as a matter of right, under Rule 38 (b) of the Federal Rules for Civil Procedure, and that it was not discretionary with the trial court, but that it was his duty as a matter of law to grant petitioners' demand for a jury trial.

Mandamus Proper Remedy.

There can be no doubt that mandamus lies to obtain a jury trial in the federal court where the same is incorrectly and erroneously withheld. **Beacon Theatres, Inc. v. Westover,** 359 U. S. 500; decided May 25, 1959 (Dist. Ct. for the Southern Dist. of California and Court of Appeals for the Ninth Circuit reversed).

In the **Beacon** case the prospective defendant brought suit against petitioner in a Federal District Court for a declaratory judgment. Petitioner filed a counterclaim raising the issues which would have been raised in the anti-trust suit for treble damages and demanded a jury trial. Purporting to act within the Court's discretion under Rules 42 (b) and 57c, the District Court ruled that it would try in equity without a jury the issues common to both proceedings before trying petitioner's counterclaim. The Court of Appeals held that the District Court had acted within the proper scope of its discretion, and it denied petitioner's application for a writ of mandamus requiring the District Court to set aside its ruling. The judgment of the Court of Appeals was reversed.

Mr. Justice Black (l. c. 501) stated:

> "We granted certiorari, because 'Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care' ", citing **Dimick v. Schiedt,** 293 U. S. 474, 486.

Your petitioners believe that the case of **Canister, et al. v. Leahy, et al.,** 191 F. 2d 255 (CCA 3), decided 1951, certiorari denied 1951, 342 U. S. 893, 96 L. Ed. 669, 72 S. Ct. 201, lays down the correct rule (l. c. 257):

"Once the amendments had been allowed there was set up in the face of the pleadings that 'guide post which

must direct the court below in its determination as to whether jury trials are to be ordered.' 184 F. 2d at page 514. The amendments were allowed on October 3, 1950, and served and filed on the same day as were demands for jury trials. October 3, 1950, then was the day on which the guide post was set up. Canister has brought itself within the provisions of Rule 38 (b). The demand for jury trial was made within '10 days after the service of the last pleading directed to such issue'. No constitutional question is presented. We entertain no doubt that the Court below erred in striking out the jury demands. The case is one for the issuance of the writ of mandamus. We possess the power to do so under Section 1651, Title 28 U. S. C. A. Appeal, after an abortive trial to the court, would be a clearly inadequate remedy. Cf. Ex Parte Fahey, 332 U. S. 258, 259" (and citing other cases). The ruling of the Court of Appeals for the Eighth Circuit is thus in conflict with that of the Third Circuit.

In the case at bar, obviously the amendments to the answers of defendants were material and important, otherwise the trial Court would not have ordered them stricken in order to deprive the plaintiffs of a jury trial.

The case of **Bereslavsky v. Kloeb**, 162 F. 2d 862 (Circuit Court of Appeals, 6th Circuit, June 30, 1947), was a patent infringement suit begun by a bill in equity for an injunction and accounting. On May 21, 1946 the patent in suit expired. Thereafter, on August 27th the petitioner moved for leave to amend his petition striking the prayer for equitable relief and accounting and substituting therefor a prayer for money damages, and an order granting the motion was entered September 24th. On October 2, 1946 an amended complaint was filed seeking money damages and five days thereafter the plaintiff demanded a jury trial pursuant to Rule 38.

The Court of Appeals for the 6th Circuit held that at the time of the filing of the patent infringement suit, the

plaintiff could not have demanded a jury trial, but that the right to jury trial arose when the amended complaint was filed seeking money damages only and hence a jury trial was not waived under the federal rule for failure to demand such trial within 10 days after service of the last pleading directed to issues raised by original pleadings, and demand within 10 days after amendment of the complaint was timely, notwithstanding the fact that the amended complaint may not have stated a new issue since it stated a different cause of action.

It is the position of petitioners in the case at bar that if the National Dairy Products Corporation went out of the case, whether by negotiation or otherwise, its affirmative defenses would go out of the case with this defendant and the affirmative defenses stricken by the trial Court would not be available to the remaining defendants, since they waived these defenses, not having objected to the order of the Court withdrawing the amended answers, and therefore the Court in charging the jury, could not consider these affirmative defenses and as a matter of law could not permit evidence under these stricken issues. Therefore these affirmative defenses were material and important and created new issues as to each of the defendants who pleaded them in their respective amended answers, and thus justfied the petitioners' demand for a jury trial.

CONCLUSION.

In conclusion, under the former law, a civil case could be tried by the Court without the intervention of a jury only when the parties waived their right to a jury by a stipulation in writing (Dimick v. Schiedt, supra). Every reasonable presumption was indulged against a waiver. Rule 38 has reversed this condition, but has set out clearly under subdivision (a) that "the right of trial by jury as declared by the Seventh Amendment to the Con-

stitution or as given by a statute of the United States shall be preserved to the parties inviolate." Therefore unless waived by a party, the right subsists. The demand in the case at bar was made within 10 days "after the service of the last pleading directed to such issue". With all due respect to the trial judge; petitioners contend most earnestly that this right to a jury trial could not be circumvented by the action of the Court in setting aside the last pleadings containing the new issues and then denying the jury trial. If it can be properly done in this case, what is to prevent any Court from depriving a party of a jury trial by the simple expedient of setting aside the last amended pleading raising new issues, although filed by leave of Court? The ruling and order of the Circuit Court of Appeals is erroneous and should be reversed.

Petitioners respectfully pray that this be done.

Respectfully submitted,

J. L. LONDON,

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APPENDIX A.

In the United States District Court,
Eastern District of Missouri,
Eastern Division.

Ozark Dairy Company, a Corporation, et al., Plaintiffs, vs. Adams Dairy Company, a Corporation, et al., Defendants.	No. 58 C 447 (1).

Partial Transcript of Proceedings on Plaintiffs' Request for a Jury Trial.

Be It Remembered, that on Friday, May 18, 1962, the above entitled matter came on for hearing before the Honorable Roy W. Harper, District Judge.

Appearances:

The plaintiffs were represented by Messrs. Samuel B. Murphy and J. L. London, 506 Olive Street, St. Louis 1, Missouri.

The defendant Adams Dairy Company was represented by Mr. J. Leonard Schermer, 611 Olive Street, St. Louis 1, Missouri.

The defendant National Dairy Products Corporation was represented by Mr. Paul B. Rava, 705 Olive Street, St. Louis 1, Missouri.

The defendants The Great Atlantic & Pacific Tea Company, Inc., and A. Moll Grocer Company were represented by Messrs. J. Terrell Vaughan and John P. Emde, 506 Olive Street, St. Louis 1, Missouri.

The defendant The Kroger Company was represented by Mr. R. H. McRoberts, Jr., Boatmen's Bank Building, St. Louis 2, Missouri.

The defendant ACF-Wrigley Stores, Inc., was represented by Myron Gollub and Sam Elson, 7 North 7th, St. Louis 1, Missouri.

The Court: Ozark Dairy vs. Adams, et al.

Mr. Rava: If the Court please, the only issue, I believe comes up this morning relates to the request by the plaintiff for a jury trial. We respectfully submit that the request is belated for the following reasons:

Suit was filed in November of 1958; the answers, group of answers were filed in December of 1959. In the year 1960 there were at least one or two—two pre-trial conferences and two more pre-trial conferences in the year 1961: The case was set for trial by this court on June 4th, under date of February 23rd, and we respectfully believe that this request filed last Friday is belated. The answer that National Dairy filed in December raised all the issues which are significant to the case, and if the plaintiffs are relying on those amended answers which were filed by some defendants, they do not represent any change in the substance of the issues presented in the original answer of National Dairy. That was the ground, as I recall, by which the court allowed the amendments, which are purely technical, and under the courts' decisions, which are consistent on this point, it is only an amendment which goes to the change of the substance of the cause of action which becomes significant under Rule 38, but not when the amendment is technical in nature like these were. There are no facts of any significance that are tendered by these amendments and certainly all those issues were presented by the answer of National Dairy filed in December of 1959.

Now, we believe further, your Honor, as a result of the pre-trial conferences had in this case that the attorneys for the plaintiffs, the firm of Yawitz, Long, et cetera, rep-

resented by Mr. Batts and Mr. Brauer; believed that this was a case that was complicated, many defendants, different issues, and they felt that it was a difficult case that would be more fitting for a court than for a jury to decide, and it was a deliberate action on their part not to ask for a jury trial. We understand there was a lot of preparation given in advance of the case, and that must have been a deliberate conclusion. True enough, there has been a change of counsel for plaintiff and new counsel took over in January of 1962, so even from that standpoint there were five months which went by, and I am sure they were acquainted with the problem earlier, or, if not, I don't believe that would be a ground for obtaining the trial at this late date, just about two weeks before the setting.

The Court: Do you have that motion that they filed.

Mr. London: If your Honor please, I'm not going to go into the question of the difficulties that were encountered at this time. The question now is whether or not we are entitled to a jury trial. Of course, I appreciate, as your Honor well knows, it is with the discretion of your Honor. Frankly, in my humble judgment I don't think we have to rely on that situation. Although this case has been pending for these years, as Mr. Rava stated, they never saw fit to file amended answers until just recently. Then your Honor permitted them to file amended answers, and they stated in open court, if I remember correctly, that the only new issue that they were filing in their amended answers was the issue of the statute of limitations. As a matter of fact, they set forth—all except the National Dairy Company set forth what they call further defenses, affirmative defenses, and they allege that any damages which the business or property of the plaintiffs or either of them might have suffered resulted directly from plaintiffs' own wrongful actions in knowingly and willfully participating in and in fact instigating or being instrumental in instigating the pricing pattern which

they now complain of as having constituted a violation of the anti-trust laws.

That, in my judgment, constitutes an admission that there was some system that they were indulging in, how they allege that they participated in and even instigated. We are entitled to make an investigation of that, your Honor, and we will not have time between now and June 4th to do all the things that we are called upon to do and to do justice to our client and to the court. In any event, I think we are entitled to a jury trial.

I have some decisions here which I would like to have your Honor look at. Breslansky v. Cloeb. It's a 6th Circuit case, 162 Federal (2d) 862. That is followed in Black v. Boyd, 248 Federal (2d) 156, l. c. 161, where there is a full discussion on the subject. There is also Bereslavsky against Caffey, 2nd Circuit, cited in 1947. It's 161 Federal (2d) 499.

I think we are absolutely entitled to a jury trial; new issues presented, and we filed it within the 10-day period. Your Honor knows Rule 38 provides that you have a right to ask for a jury trial within ten days after the last pleading is filed, and since all but the National Dairy has filed amended answers, and we asked for a jury trial within ten days, I submit, your Honor, we are entitled to a jury trial.

Mr. Rava: Your Honor, may I have a word in rebuttal on that?

I followed Mr. London very closely, and the language he read from the amended answers is copied verbatim from the answer of National Dairy, which is set out as paragraph 9 on pages 3 and 4 of the answer of National Dairy filed in December of 1959, exactly, December 30, 1959. There is the exact same language, namely, "any damages which the business or property of the plaintiffs, or either of them, may have suffered resulted directly from plaintiffs' own wrongful actions in knowingly and willfully participating in and in fact instigating or being

instrumental in instigating the pricing pattern which they now complain of as having constituted a violation of the anti-trust laws." It seems to me that Mr. London's statement would tend to indicate that he has not read the answer filed by National Dairy, which was, as I said, copied verbatim on this point in the amended answers of the other defendants, and certainly we raise the issue of the plaintiffs' own willful conduct in the establishment of a pricing pattern which is another way to call it, price war, and we pleaded that in 1959. Plaintiffs had adequate notice of that issue.

As far as the cases that Mr. London has cited, we are familiar with them. They have no bearing on this issue. These cases relate to situations in which there was a change in the nature of the cause of action. That is the 162 Federal (2d) decision by the 6th Circuit, where there was a new issue altogether tendered because the case there was changed by the amendment from equity to law, and the court said, therefore, instead of having an equitable issue triable before the court there is now an issue of damages as to which the party is entitled; has a right to a jury trial. That was considered to be a critical amendment as affecting the nature of the cause of action pleaded. Those cases are distinguished in later authorities of the 5th and 2nd Circuits and the 10th Circuit, and I have just a list of citations for the convenience of the court and a copy for counsel, and they clearly distinguish the cases relied on by the plaintiffs today.

So we believe that this amendment that is before the court in the nature of the amended answers of some of the defendants is a repetition on their part of what was already in this case; no new issue is tendered whatsoever.

Mr. London: If your Honor please, very briefly by way of reply, I contend, your Honor, that we are entitled to go into the question of each one of these defendants. Now, we had a right to assume that they waived any such defense until they pleaded. We have to go into each one of

those; we have to go into their records; we have to find out why they are contending that at this time, why they have never contended it before, so as far as that is concerned, even though National pleaded, the others didn't, and it's going to take a great deal of work on our part, and we are frankly surprised as far as that issue is concerned, and as far as these other defendants are concerned, we are certainly entitled to investigate them.

I want to say this, too, your Honor:——

The Court: Let's be perfectly frank for the record, as far as that is concerned, the whole trouble with respect to this jury is due to the fact that I mentioned last week in the meeting that they had here in reply to some statement that was made by the attorneys for plaintiffs when they were talking about a jury that a jury wasn't involved. I don't think you gentlemen realized up until then that there had been no jury requested.

Mr. London: I'll say frankly to the court I did not know it, your Honor, until your Honor mentioned it.

The Court: It's been the policy of this court to not strictly enforce the 10-day rule because of the fact that in the state court the rule is different. In view of that fact I have been liberal with respect to it in permitting a request for a jury at any time up until the setting, and that is uniformly followed. A case may have been here some time, but once it's set it's the policy of the court to not change it without the agreement of the parties. I felt it was a matter you can't be going in one direction on in one case and in another on another, and we have from time to time taken some of them off the non-jury setting and put over on the jury setting, but it's only been where both attorneys requested that that be done. Of course, they don't agree with you on that. As far as the court's concerned, it makes no difference to the court one way or the other. As a matter of fact, I prefer to try cases to the jury rather than the court because you get rid of them, but you have to have some policy to follow to

keep from having utter chaos, and so I have consistently followed the pattern that once the case is set that the only way that I will change it from a non-jury to a jury setting is for both attorneys to agree. If it's on the non-jury docket, there is a jury request, it takes both of you to do it to take it off of that. The rules, I think, provide that, but on the other, it's a matter that we have not —I have not, and I don't believe either of the other judges have either, strictly enforced the rule because of the state rule where you are given that, unless you waive it, if it is a jury case. I think they have followed the pattern that once it's set it's set.

Mr. London: Your Honor, doesn't it devolve frankly on this situation, if it is discretionary with your Honor, then you have a right to do it?

The Court: I'm not going to do it if it's a matter of discretion. I can tell you the only way you're going to get it is if both sides agree to it, because that is the policy I have followed for almost fifteen years and I'm going to continue to follow it.

Mr. London: If we're entitled to it as a matter of law——

The Court: If you're entitled to it as a matter of law, you're entitled to it, no question about that. I'll take a look at it and see what I think about it, but, as I say, if I hadn't said anything to you last Friday, the request wouldn't be here yet. That's really what brought the matter up.

Certificate.

I, Olive L. Poole, official court reporter, do hereby certify that on the date aforesaid I reported in stenotype the proceedings herein, and that the foregoing is a true and accurate transcript of the portion herein transcribed.

Olive L. Poole.

APPENDIX B.

United States Court of Appeals
For the Eighth Circuit.

Misc. No. 165 September Term, 1961

In the matter of the Ozark Dairy Company, a corporation, and John Brauch, d/b/a Cool Valley Dairy,
Petitioners. } Order.

Application for leave to file petition for mandamus denied.

June 8, 1962.

A true copy:

Attest:

Robert C. Tucker,
Clerk, U. S. Court of Appeals,
8th Circuit.

APPENDIX C.

United States Court of Appeals for the Eighth Circuit.

No. .....

Original.

Ex Parte:

In the Matter of the Ozark Dairy Company, a corporation, and John Brauch, d/b/a Cool Valley Dairy,

Petitioners.

Motion for Leave to File Petition for Mandamus.

Petitioners respectfully move this Court:

(1) For leave to file the petition hereto annexed, for a writ of mandamus, under Section 1651 of Title 28 of the United States Code;

(2) That a rule be entered and issued directing the Honorable Roy W. Harper, Judge of Court No. 1 of the United States District Court for the Eastern District of Missouri, Eastern Division, to show cause why a writ of mandamus should not issue against him in accordance with the prayer of said petition, and why petitioners should not have such other and further relief as may be just and proper.

Dated, at St. Louis, Missouri, this 29 day of May, 1962.

Samuel B. Murphy,
J. L. London,
506 Olive Street (1711),
St. Louis 1, Missouri,
Ma 1-1462,
Attorneys for Petitioners.

Cook, Murphy & English,
506 Olive Street,
St. Louis 1, Missouri,
Of Counsel.

APPENDIX D.

United States Court of Appeals for the Eighth Circuit.

No. .....

In the Matter of the Ozark Dairy Company, a Corporation, and John Brauch, an Individual, d/b/a Cool Valley Dairy,

Petitioners.

To—The Honorable The Judges of The United States Court of Appeals for the Eighth Circuit:

Petition for Mandamus.

In the matter of the petition of the Ozark Dairy Company, a corporation, and John Brauch, an individual, d/b/a Cool Valley Dairy, for a writ of mandamus, to require the Honorable Roy W. Harper, Judge of the United States District Court for the Eastern District of Missouri, Eastern Division, to grant the request of the petitioners for a jury trial in Cause No. 58 C 447, now pending before the said Honorable Roy W. Harper, pursuant to Rule 38 of the Federal Rules of Civil Procedure:

The petition of Ozark Dairy Company, a corporation, and John Brauch, an individual, d/b/a Cool Valley Dairy, respectfully shows:

(1) That the Ozark Dairy Company is a corporation doing business in the State of Missouri; and that John Brauch is an individual, doing business under the name of Cool Valley Dairy, with his principal place of business in St. Louis County, Missouri:

(2) That on November 5, 1958, the petitioners filed a complaint in the United States District Court for the Eastern District of Missouri, Eastern Division, being Cause No. 58 C 447, against Adams Dairy Company, Adams Dairy, Inc., Aro Dairy Company, Pevely Dairy Company, Velvet Freeze, Incorporated, Bettendorf-Rapp Produce Company, Bettendorf-Rapp Transportation Company, Bettendorf's Rapp's, Inc., A. Moll Grocer Company, Rapp's Southtown Super Market, Inc., Rapp's Super Markets of Missouri, Inc., Schnuck Market Dellwood, Inc., Schnuck Market Florissant, Inc., Schnuck Market Overland, Inc., Schnuck Markets Brentwood, Inc., Schnuck Markets, Manchester, Inc., and Tom Boy, Inc., claiming violations of the anti-trust laws of the United States; that thereafter the plaintiffs amended their complaint on March 29, 1959, and a copy of the amended complaint is attached hereto; that count four of the said complaint was stricken by order of court on June 19, 1959; that the defendants filed answers to the said complaint, and the said original typical answers of said defendants denied the allegations of the amended complaint; attached hereto is a copy of the answer of the defendant Adams Dairy, Inc., which is typical of all of said answers with the exception of the answer of the defendant National Dairy Products Corporation, the only defendant who pleaded that plaintiffs' damage resulted directly from their own wrongful acts, pleading also the statute of limitations. A copy of the said answer of the defendant National Dairy Products Corporation is attached hereto.

(3) That the plaintiffs on various dates voluntarily dismissed the defendants Velvet Freeze, Incorporated, Tom Boy, Inc., and A. Moll Grocer Company.

(4) That on April 25, 1962 the motions of the defendants Adams Dairy, Inc., Adams Dairy Company, Aro Dairy

Company, Pevely Dairy Company, A. Moll Grocer Company, Schnuck's Markets, National Food Stores, Inc., ACF-Wrigley Stores, Inc., The Great Atlantic & Pacific Tea Company and the Kroger Company, for permission to amend their answers were filed; argument requested; and the aforesaid defendants' proposed amended answers "lodged";

(5) The records of the said District Court show that on May 4, 1962, "joint motion of all defendants to amend answers argued and sustained and said answers heretofore 'lodged' are now ordered filed and are filed."

(6) Attached hereto is a copy of the amended answer of defendant, Aro Dairy Company, which is typical of the said amended answers filed by the defendants, Adams Dairy Inc., Adams Dairy Company, Aro Dairy Company and the Pevely Dairy Company, which embodied affirmative defenses not theretofore pleaded by said defendants which are in words and figures substantially as follows, to-wit:

"Any damages which the business or property of the Plaintiffs, or either of them, might have suffered, resulted directly from Plaintiffs' own wrongful actions in knowingly and willfully participating in, and in fact, instigating or being instrumental in instigating, the pricing pattern which they now complain of as having constituted a violation of the anti-trust laws.

"That this Defendant has not conspired or agreed with any Co-Defendant with regard to the fixing or determining the price or prices at which this Defendant from time to time sold its milk; and that any differentials in the price of milk sold only made due allowances for difference in the costs of manufacture, sale or delivery resulting from the different methods or quantities in which such milk is sold to purchasers; that this Defendant selected its own

customers in bona fide transactions and not in restraint of trade; that this Defendant changed prices from time to time wherein in response to changing conditions affecting the market for or the marketability of the milk; that this Defendant, in pricing the milk furnished to any purchaser or purchasers, determined such pricing in good faith to meet the low prices of its competitors or the services or facilities furnished by said competitors; this Defendant sold milk to the selected customers and offered milk to the said selected customers at prices and with facilities and services and for consideration available on proportionally equal terms to all other selected customers competing in the distribution of such products or commodities.

"That this Defendant states that insofar as the Amended Complaint purports to assert a claim arising out of events or transactions which took place more than four (4) years immediately prior to the filing of this action, the said Amended Complaint is barred by the applicable statute of limitations."

(7) The record further shows that on May 4, 1962 the separate amended answer of the defendant, Pevely Dairy Company, to plaintiff's amended complaint, was filed by leave; and that on May 11, 1962 the separate amended answer of the defendant Kroger Company was filed by leave.

(8) On May 11, 1962, plaintiffs' demand for jury trial was filed. On May 15, 1962 defendants' joint motion to strike jury demand was filed.

(9) On May 18, 1962 the record shows:

"Motion of defendants to strike plaintiffs' demand for jury trial heretofore filed is argued and submitted; leave heretofore granted to the defendants * * * to file amended answers is hereby withdrawn and said amended answers

stricken; defendants' motion to strike plaintiffs' demand for jury trial is sustained."

(10) Petitioners further state that under Rule 38 of the Federal Rules of Civil Procedure the petitioners had a right to demand a jury trial within ten days after the filing of the last pleading, which petitioners did; that on Friday, May 25, 1962 the petitioners, by counsel, again stated to the Court that the petitioners are entitled to a jury trial, but the said Court again refused to consider the same.

(11) Petitioners further state to the Court that since the defendant National Dairy Products Corporation may go out of the case either through negotiations or by order of the Court, or otherwise, this would have left the other defendants with the affirmative defenses undertaken to be filed in their said amended answers, but for the action of the Court by the expedient of withdrawing the order or leave authorizing the filing of the said amended answers containing the affirmative defenses, which action would deprive these petitioners of a jury trial.

(12) Petitioners further state that they are entitled to a jury trial under the law as a matter of right, and that they can only obtain relief and a jury trial by application for a writ of mandamus, since the order of the Honorable Roy W. Harper refusing petitioners a jury trial is not appealable, and the Court has indicated he will insist upon trial without a jury, and has set the case for trial on June 4, 1962, and has stated that he will insist upon going to trial on that date without a jury; that the said trial will in all probability require several weeks; therefore, the issue of the right of a trial by jury should be determined before June 4, 1962, or the said petitioners will sustain irreparable damage, and will be deprived of a valuable right.

Wherefore, petitioners pray that a writ of mandamus may issue out of this Court directed to the Honorable Roy W. Harper, Chief District Judge, of the United States District Court for the Eastern District of Missouri, Eastern Division, requiring him to grant the request of petitioners for a jury trial in said Cause No. 58 C 447 now pending before the said Court.

John Branch, d b a Cool Valley Dairy,
Petitioner.

Samuel B. Murphy,
J. L. London,
506 Olive Street (1711),
St. Louis 1, Missouri,
Ma 1-1462,
Attorneys for Petitioners.

Cook, Murphy & English,
506 Olive,
St. Louis, Mo.,
Of Counsel.

State of Missouri, } ss
City of St. Louis. }

Comes now John Branch, d b a Cool Valley Dairy, who being first duly sworn, upon his oath says that he has read the foregoing Pefition for Mandamus, and that it is true to the best of his knowledge, information and belief.

John Branch.

Subscribed and sworn to before me this ... day of May, 1962. My commission expires October 19, 1964.

Amy G. Edwards,
Notary Public.

In the District Court of the United States
For the Eastern Division, Eastern Judicial District
of Missouri.

Cause No. 58-C-447.

(Caption omitted.)

Complaint (as Amended).

Come now the plaintiffs and for their complaint against defendants state as follows:

I. **Plaintiffs**—Plaintiff Ozark Dairy Company is a corporation organized and existing under the laws of the State of Missouri, with its principal place of business in St. Louis, Missouri; John Branch is an individual doing business under the name of Cool Valley Dairy, with his principal place of business in St. Louis County, Missouri.

II. **Defendants**—Defendants Adams Dairy Company, Adams Dairy, Inc., Aro Dairy Co., Pevely Dairy Company, Velvet Freeze, Incorporated, Bettendorf-Rapp Produce Company, Bettendorf-Rapp Transportation Company, Bettendorf's Rapp's Inc., A. Moll Grocer Company, Rapp's Southtown Super Market, Inc., Rapp's Super Markets of Missouri, Inc., Schnuck Market Dellwood, Inc., Schnuck Market Florissant, Inc., Schnuck Market Overland, Inc., Schnuck Markets Brentwood, Inc., Schnuck Markets Manchester, Inc., and Tom Boy, Inc., are corporations organized and existing under the laws of the State of Missouri and doing business in the metropolitan St. Louis area; National Dairy Products Corp. and ACF-Wrigley Stores, Inc., are corporations organized and existing under the laws of the State of Delaware and qualified to do and doing business within the metropolitan St. Louis area; The Great Atlantic & Pacific Tea Co. is a corporation organized and

existing under the laws of the State of New Jersey and qualified to do and doing business within the metropolitan St. Louis area; The Kroger Co. is a corporation organized and existing under the laws of the State of Ohio and qualified to do and doing business within the metropolitan St. Louis area; National Food Stores, Inc., is a corporation organized and existing under the laws of the State of Michigan and qualified to do and doing business within the metr politan St. Louis area.

III. **Joinder of Parties**—This action is brought by both plaintiffs joining in one action; each plaintiff is bringing the action on behalf of and for the benefit of himself; the character of the right sought to be enforced for the plaintiffs is several; the rights of the plaintiffs herein joined arose out of the same series of transactions and occurrences; there are common questions of law and fact affecting their several rights.

IV. **Definitions.**

1. "Commerce" shall mean trade or commerce among the several states.

2. "Handlers" shall mean some or all of the following named defendants: Adams Dairy Company, Adams Dairy, Inc., Aro Dairy Co., National Dairy Products Corp. and Pevely Dairy Company. They are principally engaged in the purchasing, processing, distribution and sale, both at wholesale and retail, of milk and milk products.

3. "Metropolitan St. Louis area" shall mean the territories within the corporate limits of the cities of St. Louis, Kirkwood and Valley Park and also territories within St. Ferdinand, Normandy, Clayton, Jefferson, Gravois and Lemay townships in St. Louis County, Missouri.

4. "Milk" shall mean cows' milk of a like grade and quality which is sold for use, consumption, or resale within the United States.

5. "Retailers" shall mean some or all of the following named defendants: ACF-Wrigley Stores, Inc., The Great Atlantic & Pacific Tea Co., Bettendorf-Rapp Produce Company, Bettendorf-Rapp Transportation Company, Bettendorf's Rapp's Inc., The Kroger Co., A. Moll Grocer Company, National Food Stores, Inc., Rapp's Southtown Super Market, Inc., Rapp's Super Markets of Missouri, Inc., Schnuck Market Dellwood, Inc., Schnuck Market Florissant, Inc., Schnuck Market Overland, Inc., Schnuck Markets Brentwood, Inc., Schnuck Markets Manchester, Inc., Tom Boy, Inc., and Velvet Freeze, Incorporated. They are corporations principally engaged in the distribution and sale of food products, including milk, for human consumption throughout the metropolitan St. Louis area and some of them elsewhere in the State of Missouri and in other states of the United States and District of Columbia. Upon information and belief, ACF-Wrigley Stores, Inc., is the owner of a controlling interest in all of the Bettendorf and Rapp companies named above.

Count One.

V. Contract Combination or Conspiracy in Restraint of Trade.

A. Jurisdiction.

1. This is a civil action arising under Acts of Congress regulating commerce or protecting trade and commerce against restraints and monopolies, to-wit: 15 U. S. C. A., Sections 1-4, inclusive, commonly known as the Sherman Act.

2. Plaintiffs seek to prevent and restrain violations of Section 1 of Title 15, U. S. C. A.

3. Plaintiffs are suing for injunctive relief against threatened loss or damage by a violation of the anti-trust laws in order to prevent irreparable harm to them and harm for which there is no adequate remedy at law.

4. Plaintiffs have been injured in their business and property by reason of defendants' violations of the anti-trust laws.

B. Statement of Facts Upon Which Relief Can Be Granted.

1. Conspiracy.

a. Handlers have from time to time, at least from and after January 1, 1954, the exact beginning of which is unknown to plaintiffs, offered milk for sale to Retailers and others at prices which were from time to time, below the cost of production of such milk, at prices which were from time to time designed and set to eliminate and destroy the competition by plaintiffs in the sale of milk, and from time to time at unreasonably low prices for the purpose of destroying competition by plaintiffs and from time to time at prices which were lower in the metropolitan St. Louis area than those offered by defendant milk Handlers elsewhere in the State of Missouri and in other states of the United States and in the District of Columbia; defendant Retailers contracted, combined or conspired with defendant milk Handlers in the illegal sale of milk as aforesaid by knowingly receiving the benefits of said illegal prices, or by receiving the benefits of said illegal prices in circumstances such that they should have known said prices were illegal, and in either case with knowledge also of the purpose of such prices.

b. The officers and directors of each of defendant Handlers have combined and conspired among themselves and with defendant Handlers on an intra-corporation basis,

during the time of the acts alleged in paragraphs V, B, 1, a. above, to perpetrate the acts and for the same purposes complained of in regard to Handlers in paragraphs V, B, 1, a.

2. Interstate Commerce Affected.

a. The milk sold in the metropolitan St. Louis area is customarily produced on dairy farms located both in the State of Missouri and in the State of Illinois and a very substantial portion thereof is produced in the State of Illinois and elsewhere, other than the State of Missouri, and shipped to the State of Missouri to the processing plants of defendant milk Handlers or to plaintiffs or to others from whom plaintiffs obtain it; milk is perishable in nature and cannot be stored and must reach the ultimate consumers thereof within a short time of producing so that from day to day there is a continuous flow of milk from producers in Illinois, and elsewhere other than the State of Missouri, to defendant Handlers and plaintiffs and others in said metropolitan St. Louis area and thence to defendant Retailers and ultimate consumers; by reason thereof the business of buying, selling, processing and distributing milk in the metropolitan St. Louis area involves the transportation of milk in interstate commerce and constitutes interstate commerce. Both plaintiffs and defendants are and were engaged in such interstate commerce.

b. The acts of defendants herein complained of have had and will in the future have the effect of restraining interstate commerce and trade in milk into and out of the metropolitan St. Louis area, in that said acts tend to eliminate competition in the purchase of milk in interstate commerce, from plaintiffs and others who, like defendants, engage in such purchasing, and thereby tend to impose upon interstate commerce the burden of a monopoly.

C. **Statement of Damages Suffered, and Prayer for Relief**—By reason of the said contracts, combinations or conspiracies by and between the defendants from January 1, 1954, to the filing of this Complaint, each of the plaintiffs has been damaged in his business and property in the following amounts, to-wit:

Ozark Dairy Company, a corporation, $325,025.21.

John Brauch, d/b/a Cool Valley Dairy, a sole proprietorship, $24,388.52.

That plaintiffs are entitled to recover of the defendants, threefold the said damages and costs, including reasonable attorneys' fees.

Wherefore, plaintiffs pray:

(a) Judgment against the defendants for treble damages, or $1,048,241.19, and for costs, including reasonable attorneys' fees as provided by law;

(b) Permanent injunction against the defendants restraining and enjoining them from continuing the said violations of the aforesaid acts.

Count Two.

VI. **Price Discrimination.**

A. **Jurisdiction.**

1. This is a civil action arising under Acts of Congress regulating commerce or protecting trade and commerce against restraints and monopolies, to-wit: 15 U. S. C. A., Sections 12-27, inclusive, commonly known as the Clayton Act.

2. Plaintiffs seek to prevent and restrain violations of Section 13 of Title 15, U. S. C. A.

3. Plaintiffs are suing for injunctive relief against threatened loss or damage by a violation of the anti-trust laws in order to prevent irreparable harm to them and harm for which there is no adequate remedy at law.

4. Plaintiffs have been injured in their business and property by reason of defendants' violations of the anti-trust laws.

B. Statement of Facts Upon Which Relief Can Be Granted.

1. **Interstate Commerce.**

a. Plaintiffs restate and incorporate by reference paragraphs V, B, 2, a. above.

b. Some of the others who are discriminated against by Handlers and by Retailers in the price of milk as hereafter set forth are located and execute purchases in other states, and some are located and execute purchases in the State of Missouri.

c. Purchases involved in such discrimination are in commerce because:

(1) Purchasers other than Retailers purchase, and have the completely processed milk shipped to them to their own location in other states from Handlers in Missouri.

(2) Such purchases constitute a portion of the interstate commerce described in paragraphs V, B, 2, a. above.

2. **Price Discrimination.**

a. Retailers are purchasers, among others, of milk sold by Handlers.

b. Handlers and Retailers discriminate in the price of milk between Retailers, between other purchasers and be-

tween Retailers and other purchasers, said discrimination being adverse to such others.

c. The aforesaid price discriminations exist because of a difference in the price charged and received by Handlers and Retailers to and from some purchasers and that charged and received by Handlers and Retailers to and from other purchasers, which difference is explainable only as an attempt to thereby lessen, injure and destroy competition.

3. **Effect on Competition**—The effect of the aforesaid discrimination may be substantially to lessen competition or tend to create a monopoly in commerce, or to injure, destroy or prevent competition with Handlers, Retailers, or customers of either, because:

Such discrimination has an obvious and intended tendency to attract to Handlers and Retailers from others providing like or similar services or goods for sale those who, but for such discrimination, would have purchased from such others, which same attraction leaves such others in a weakened condition to compete and can eventually lead to their utter inability to compete. Such others, including plaintiffs, or some of them, are competing with Handlers and Retailers in the interstate purchase and sale of raw milk.

C. **Statement of Damages Suffered and Prayer for Relief**—By reason of the said discriminations, from January 1, 1954, to the filing of this Complaint, each of the plaintiffs has been damaged in his business and property in the following amounts, to-wit:

Ozark Dairy Company, a corporation, $325,025.21.

John Branch, d/b/a Cool Valley Dairy, a sole proprietorship, $24,388.52.

That plaintiffs are entitled to recover of the defendants, threefold the said damages and costs, including reasonable attorneys' fees.

Wherefore, plaintiffs pray:

(a) Judgment against the defendants for treble damages, or $1,048,241.19, and for costs, including reasonable attorneys' fees as provided by law;

(b) Permanent injunction against the defendants restraining and enjoining them from continuing the said violations of the aforesaid acts.

Count Three.

VII. **Knowingly Inducing or Receiving Discriminatory Price.**

A. **Jurisdiction.**

1. This is a civil action arising under Acts of Congress regulating commerce or protecting trade and commerce against restraints and monopolies, to-wit: 15 U. S. C. A., Sections 12-27, inclusive, commonly known as the Clayton Act.

2. Plaintiffs seek to prevent and restrain violations of Section 13 of Title 15, U. S. C. A.

3. Plaintiffs are suing for injunctive relief against threatened loss or damage by a violation of the anti-trust laws in order to prevent irreparable harm to them and harm for which there is no adequate remedy at law.

4. Plaintiffs have been injured in their business and property by reason of defendants' violations of the anti-trust laws.

B. **Statement of Facts Upon Which Relief Can Be Granted.**

1. **Interstate Commerce.**

a. Retailers are engaged in commerce in that:

(1) Retailers purchase goods and merchandise from other states which are delivered to them across state lines.

(2) Plaintiffs restate and incorporate by reference paragraphs V, B, 2, a. above.

b. Retailers have knowingly induced and or received the discrimination, described in paragraphs VI, B, 2, b. and c. above, in the course of commerce in that Retailers, during the time in which they received such discrimination:

(1) Have been engaged in the purchase of goods and merchandise from other states as stated in paragraph 1 of this sub-part;

(2) Have been engaged in the purchase of milk from Handlers as described in paragraphs V, B, 2, a. above.

2. **Knowingly Receiving or Inducing Discrimination.**

a. Retailers have knowingly induced the discrimination described in paragraphs VI, B, 2, b. and c. above:

(1) By apprising Handlers of their willingness to sell milk on price terms which were discriminatory in their favor and against their competitors. They so apprised Handlers by written letter, telephone call and verbal conversation. They also so apprised Handlers indirectly by informing others who were reasonably likely to inform Handlers of Retailers' willingness to so act.

(2) By accepting milk on such discriminatory terms from others and thereby evincing a willingness to accept milk from Handlers on similar terms.

(3) By offering Handlers favorable emphasis in advertising done by Retailers.

(4) By offering Handlers favorable emphasis in marketing procedures followed by Retailers regarding milk sold by it and other products and produce sold by it, as for example, in the location of the milk in a most conspicuously favorable position on the store shelves from which consumers selected their purchases.

(5) And in other manners than those above set forth.

b. Retailers have received said discrimination by purchasing milk at discriminatory prices.

c. Retailers have knowingly received said discrimination in that:

(1) Retailers knew the prices they paid Handlers for milk and the prices paid Handlers for milk by other purchasers both within and without the State of Missouri.

(2) Retailers knew the minimum price which Handlers were permitted, by Federal law and regulation, to pay for raw milk, and must have been put on notice, thereby, since Retailers knew roughly what Handlers' minimum operating costs were likely to be, that the price at which they purchased milk from Handlers was remarkably low and that it was therefore highly unlikely that Handlers sold milk to all competitors of Retailers who also purchased from Handlers at the same price.

C. **Statement of Damages Suffered and Prayer for Relief** —by reason of the said discriminations, from January 1, 1954, to the filing of this Complaint, each of the plaintiffs has been damaged in his business and property in the following amounts, to-wit:

Ozark Dairy Company, a corporation, $325,025.21.

John Branch, d/b/a Cool Valley Dairy, a sole proprietorship, $24,388.52.

That plaintiffs are entitled to recover of the defendants, threefold the said damages and costs, including reasonable attorneys' fee.

Wherefore, plaintiffs pray:

(a) Judgment against the defendants for treble damages, or $1,048,241.19, and for costs, including reasonable attorneys' fees as provided by law;

(b) Permanent injunction against the defendants restraining and enjoining them from continuing the said violations of the aforesaid acts.

Rassieur, Long & Yawitz,

By .....

314 North Broadway,
St. Louis 2, Missouri,
CHestnut 1-5845,
Attorneys for Plaintiffs.

In the United States District Court for the
Eastern District of Missouri,
Eastern Division.

Ozark Dairy Company et al.,
Plaintiffs,
vs.
Adams Dairy Company et al.,
Defendants.
} Civil Action.
No. 58C 447 (3).

Answer of Defendant Adams Dairy, Inc.

Comes now Defendant Adams Dairy, Inc., and for answer to the Complaint herein states:

1. That it is without knowledge and information sufficient to form a belief as to the truth of the allegations contained in paragraph I of the Complaint.

2. It is a corporation organized and existing under the laws of the State of Missouri and doing business in the Metropolitan St. Louis area; and this Defendant is without sufficient knowledge and information to form a belief as to the truth of each and every other allegation contained in paragraph II of the Complaint.

3. Denies each and every allegation contained in paragraphs III and IV and all allegations contained in Counts 1, 2, 3 and 4.

Wherefore Defendant Adams Dairy, Inc., prays judgment that the Complaint herein be dismissed and that it has its costs and disbursements of this action.

Shifrin, Treiman, Agatstein & Schermer,
By J. Leonard Schermer,
1955 Railway Exchange Building,
611 Olive Street,
St. Louis, Missouri,
CHestnut 1-7240,
Attorneys for Defendant Adams Dairy, Inc.

Copies of the foregoing Answer mailed to all parties to this action on this ..... day of December, 1959.

.....

In the District Court of the United States
For the Eastern Division, Eastern
Judicial District of Missouri.

Ozark Dairy Company, a Corporation, and John Branch, d b a Cool Valley Dairy, a Sole Proprietorship, Plaintiffs, v. Adams Dairy Company et al., Defendants.	No. 58C447. Div. No. 3.

Answer of Defendant National Dairy Products Corporation to Plaintiffs' Complaint.

Comes now defendant National Dairy Products Corporation and for its answer to plaintiffs' Complaint states:

1. Admits paragraphs I and II of plaintiffs' complaint.

2. In answer to paragraph III of plaintiffs' complaint, admits that the action is brought by plaintiffs on their own behalf and that the character of the alleged rights sought to be enforced by the plaintiffs is several; but denies each and every other allegation of paragraph III.

3. In answer to paragraph IV of plaintiffs' complaint, admits that defendant National Dairy Products Corporation is engaged in buying raw milk, and processing distributing and selling milk products both at wholesale and at retail within the City of St. Louis and its adjoining territory in the State of Missouri; this defendant further admits that paragraph IV of plaintiffs' complaint purports to state plaintiffs' definitions of certain terms used in plaintiffs' complaint, but denies that such definitions are accurate, complete or that they clearly describe the terms involved.

Count One.

4. Admits that Count One of plaintiffs' complaint purports to state a cause of action under the Sherman Act,

but this defendant denies that it has violated such law, and denies that it has in any way injured plaintiffs in their business or property. Further answering the allegations of paragraph V of plaintiffs' complaint, this defendant admits that the milk products which it sells in the City of St. Louis and its adjoining territory in the State of Missouri are processed from raw milk customarily produced on dairy farms located both in the State of Missouri and in the State of Illinois; and that said raw milk is processed by this defendant in its plant in St. Louis, Missouri; but this defendant denies each and every other allegation in paragraph V of plaintiffs' complaint.

Count Two.

5. Admits that Count Two of plaintiffs' complaint purports to state a cause of action under the Clayton Act, but this defendant denies that it has violated such law; denies that it has in any way injured plaintiffs in their business or property; and further denies each and every other allegation of paragraph VI of plaintiffs' complaint except for the specific allegations admitted in paragraphs 3 and 4 hereof.

Count Three.

6. Admits that Count Three of plaintiffs' complaint purports to state a cause of action under the Clayton Act, but this defendant denies that it has violated such law, and denies that it has in any way injured plaintiffs in their business or property. In further answer to Count Three of plaintiffs' complaint, this defendant states that said Count does not even purport to set forth any allegation stating a cause of action against this defendant, but that said Count is specifically limited to allegations concerning retailers rather than handlers and processors. Insofar as any allegations of Count Three may be applicable to this defendant same are denied, except for the specific allegations admitted in paragraphs 3 and 4 hereof.

Count Four.

7. Admits that Count Four of plaintiffs' complaint purports to state a cause of action under the Clayton Act, but this defendant denies that it has violated such law, and denies that it has in any way injured plaintiffs in their business or property. This defendant further states that it neither buys from, nor sells any milk to, either of the plaintiffs, and further denies each and every other allegation of paragraph VIII of plaintiffs' complaint, except for the specific allegations admitted in paragraphs 3 and 4 hereof.

Further Defense.

8. The complaints, as amended, fails to state any claim upon which relief may be granted against this defendant.

Further Defense.

9. Any damages which the business or property of plaintiffs, or either of them, might have suffered resulted directly from plaintiffs' own wrongful acts in knowingly and willfully participating in, and in fact instigating or being instrumental in instigating the pricing pattern which they now complain of as having constituted a violation of the anti-trust laws.

First Affirmative Defense.

10. For its first affirmative defense this defendant states that it has not conspired or agreed with any co-defendant with regard to fixing or determining the price or prices at which this defendant from time to time sold its milk products; that all price determination made by this defendant with regard to said prices, and any discounts allowed thereon were arrived at by this defendant in the exercise of its independent business judgment, in the light of the various economic factors affecting its costs, level and method of distribution; the competitive nature of the market involved; the requirements of meeting competition and the fluctuating conditions of such factors; and

the resulting attempt of this defendant to meet in good faith equally low prices of its competitors.

Second Affirmative Defense.

11. For its second, and partial, affirmative defense, this defendant states that insofar as the complaint purports to assert a claim arising out of events or transactions which took place more than four years immediately prior to the filing of this action, same is barred by the applicable statute of limitations.

Wherefore, on each and all of the above grounds, in addition to those set forth in various motions heretofore filed by this defendant, the grounds of which are all re-asserted herein, defendant National Dairy Products Corporation prays to be dismissed from this action, with its costs herein expended.

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Copy of this Answer mailed to all attorneys of record this 30th day of December, 1959.

Paul B. Rava.

In the District Court of the United States for the
Eastern District of Missouri,
Eastern Division.

Ozark Dairy Company et al.,
Plaintiffs,
vs.
Adams Dairy Company et al.,
Defendants.
No. 58C477 (3).

Amended Answer of Defendant Aro Dairy Company.

Comes now the Defendant Aro Dairy Company and for its answer to the complaint herein states:

1. That it is without knowledge and information sufficient to form a belief as to the truth of the allegations contained in paragraph I of the complaint and therefore denies the same.

2. Admits that Aro Dairy Company is a corporation organized and existing under the laws of the State of Missouri and doing business in the Metropolitan St. Louis area, but states that this Defendant is without sufficient knowledge and information to form a belief as to the truth of each and every other allegation contained in paragraph II of the complaint, and therefore denies the same.

3. Denies the allegations of paragraph III of the complaint.

4. Admits that Aro Dairy Company is principally engaged in the purchasing, processing, distribution and sale at wholesale of milk and milk products, but states that it lacks information sufficient to form a belief as to the truth of the other factual allegations contained in paragraph IV of the complaint, and therefore denies the same, making no answer to the nonfactual allegations in said paragraph

constituting Plaintiffs' definitions of terms used elsewhere in the complaint.

5. Denies each and every allegation contained in Counts 1, 2, 3 and 4 of the complaint.

6. Any damages which the business or property of the Plaintiffs, or either of them, might have suffered, resulted directly from Plaintiffs' own wrongful actions in knowingly and willfully participating in and, in fact, instigating or being instrumental in instigating the pricing pattern which they now complain of as having constituted a violation of the anti-trust laws.

Affirmative Defenses.

For its affirmative defenses to the Plaintiffs' complaint this Defendant states:

1. That this Defendant has not conspired or agreed with any co-Defendant with regard to the fixing or determining the price or prices at which this Defendant from time to time sold its milk; and that any differentials in the price of milk sold only made due allowances for difference in the costs of manufacture, sale or delivery resulting from the different methods or quantities in which such milk is sold to purchasers; that this Defendant selected its own customers in bona fide transactions and not in restraint of trade; that this Defendant changed prices from time to time wherein in response to changing conditions affecting the market for or the marketability of the milk; that this Defendant, in pricing the milk furnished to any purchaser or purchasers, determined such pricing in good faith to meet the low prices of its competitors or the services or facilities furnished by said competitors; this Defendant sold milk to the selected customers and offered milk to the said selected customers at prices and with facilities and services and for consideration available on proportionally

equal terms to all other selected customers competing in the distribution of such products or commodities.

2. That this Defendant states that insofar as the complaint purports to assert a claim arising out of events or transactions which took place more than four (4) years immediately prior to the filing of this action, the said complaint is barred by the applicable statute of limitations.

Wherefore, Defendant Aro Dairy Company respectfully requests that the complaint be dismissed with its costs herein expended.

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Attorneys for Aro Dairy Company.

Copy of the foregoing answer mailed to all counsel of record this ..... day of ....., 1962.

Bertram W. Tremayne, Jr.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1962.

No. 205

OZARK DAIRY COMPANY, a Corporation, and JOHN BRAUCH, an Individual, d/b/a Cool Valley Dairy,
Petitioners,
vs.
ADAMS DAIRY COMPANY, a Corporation; ADAMS DAIRY, INC., a Corporation; THE GREAT ATLANTIC & PACIFIC TEA COMPANY, INC., a Corporation; NATIONAL DAIRY PRODUCTS CORPORATION, a Corporation; ACF-WRIGLEY STORES, INC., a Corporation; THE KROGER COMPANY, a Corporation; SCHNUCK MARKET DELLWOOD, INC., a Corporation; SCHNUCK MARKET FLORISSANT, INC., a Corporation; SCHNUCK MARKET OVERLAND, INC., a Corporation; SCHNUCK MARKETS BRENTWOOD, INC., a Corporation; SCHNUCK MARKETS MANCHESTER, INC., a Corporation;
Respondents.

Brief in Opposition to Petition for Writ of Certiorari.

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INDEX.

	Page
The opinions below	1
Question presented for review	2
Statement	3
Argument	4
I. No important question of federal law was decided below, and there are no special or important reasons requiring review by this court	4
II. Petitioners waived their right to a jury trial	5
III. The amendments to the answers were stricken. No new issue is in the case	7
IV. No case cited by petitioners sustains their position	7
Conclusion	10

Cases Cited.

American Fidelity & Cas. Co. v. All Am. Bus Lines, C. A. Okla. 1951, 190 F. [2] 234, Cert. den. 342 U. S. 851	4
Beacon Theatres, Inc., v. Westover, 359 U. S. 500	8
Bereslawsky v. Kloeb; C. A. 6, 1947, 162 F. 2d 862	8
Canister et al. v. Leahy, 191 F. 2d 255, C. A. 3, 1951, cert. den. 342 U. S. 893	8
Curry v. Pyramid Life Ins. Co., C. A. Mo. 1959, 271 F. [2] 1, Cert. den. 361 U. S. 933	4
Dimick v. Schedit (1935), 293 U. S. 474	9
Ex Parte Fahey, 332 U. S. 258	9
May v. Melvin, C. A. D. C. 1944, 141 F. 2d 22	5
Moore v. United States, C. A. 5, 1952, 196 F. 2d 906	6

Petsel v. Riley, C. A. 8, 1951, 192 F. (2) 954, 955 5
Roth v. Hyer, C. A. 5, 1944, 142 F. 2d 227, Cert. den. 323 U. S. 712 6
Scrinko v. Reading Co., D. C. N. J. 1954, 117 F. Supp. 663 5

Rules Cited.

Supreme Court Rules:
Rule 19 4
Rule 38 (b) 2, 5
Rule 38 (d) 2, 5

Miscellaneous Cited.

20 A. B. A. J. 341 4
48 Harvard Law Review 278 5

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1962

No.

OZARK DAIRY COMPANY, a Corporation, and JOHN BRAUCH, an Individual, d/b/a Cool Valley Dairy,
Petitioners,

vs.

ADAMS DAIRY COMPANY, a Corporation; ADAMS DAIRY, INC., a Corporation; THE GREAT ATLANTIC & PACIFIC TEA COMPANY, INC., a Corporation; NATIONAL DAIRY PRODUCTS CORPORATION, a Corporation; ACF-WRIGLEY STORES, INC., a Corporation; THE KROGER COMPANY, a Corporation; SCHNUCK MARKET DELLWOOD, INC., a Corporation; SCHNUCK MARKET FLORISSANT, INC., a Corporation; SCHNUCK MARKET OVERLAND, INC., a Corporation; SCHNUCK MARKETS BRENTWOOD, INC., a Corporation; SCHNUCK MARKETS MANCHESTER, INC., a Corporation,
Respondents.

Brief in Opposition to Petition for Writ of Certiorari

THE OPINIONS BELOW.

There are no official or unofficial reports of the opinions below. The rulings of the United States District Court for the Eastern District of Missouri, Eastern Division, and the United States Court of Appeals, Eighth Circuit, complained of by Petitioners are set forth in the Petition.

QUESTION PRESENTED FOR REVIEW.

The question presented for review is whether the District Court shall be ordered to grant Petitioners' request for a jury trial, taking into consideration Rule 38 (b) and (d) which reads as follows:

> (b) **Demand.** Any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefor in writing at any time after the commencement of the action and not later than 10 days after the service of the last pleading directed to such issue. Such demand may be indorsed upon a pleading of the party.
>
> (d) **Waiver.** The failure of a party to serve a demand as required by this rule and to file it as required by Rule 5 (d) constitutes a waiver by him of trial by jury. A demand for trial by jury made as herein provided may not be withdrawn without the consent of the parties.

STATEMENT.

As stated in the Petition, the action below was filed on November 5, 1958, and thereafter all Respondents herein filed Answers. All of the original Answers of Respondents were filed by April, 1960. On February 23, 1962, the District Court set the case for trial on June 4, 1962. No demand for jury trial was made until May 11, 1962. On May 4, 1962, several of the Respondents, by leave, filed Amended Answers. Defendant, National Dairy Products Corporation, did not amend the answer it had filed nearly two and a half years before. On May 18, 1962, the District Court ordered that the leave to file said Amended Answers be withdrawn and such Answers were ordered stricken. By the same order said Court sustained Respondents' motion to strike Petitioners' demand for a jury trial. Petitioners sought leave from the Court of Appeals, Eighth Circuit, to file a petition for mandamus against the Judge of the District Court. The relief sought was that the trial Judge be required to grant Petitioners a jury trial. The Court of Appeals denied leave to file the petition (Petition, Exhibits B and C).

ARGUMENT.

I.

No Important Question of Federal Law Was Decided Below, and There Are No Special or Important Reasons Requiring Review by This Court.

No question is involved here that warrants review pursuant to Rule 19 of the Rules of this Court. That rule makes it clear that only questions of importance will be reviewed upon certiorari. In the present case, the sole question is whether a District Court, under the facts and circumstances peculiar to this case only, erred in refusing to grant a jury trial. If this was error on the part of the District Court, and Respondents insist that it was not, the question may be presented upon appeal from any final order. This procedure is the one customarily followed. (See **Curry v. Pyramid Life Ins. Co.**, C. A. Mo. 1959, 271 F. [2] 1, Cert. den. 361 U. S. 933; **American Fidelity & Cas. Co. v. All Am. Bus Lines**, C. A. Okla. 1951, 190 F. [2] 234, Cert. den. 342 U. S. 851.) Thus there is no matter of great importance to be brought before the Court for review. It may appear important to the parties, but that is not the criterion to be applied; the question must be one of general importance to the administration of Federal justice. As Mr. Chief Justice Hughes pointed out in an address to the **American Law Institute**, 20 A. B. A. J. 341:

> "That review [on certiorari], we must emphasize, is in the interest of the law, not in the interest of particular parties. It is not the importance of the parties or the amount involved that is controlling, but the need of securing harmony of decision and the appropriate settlement of questions of general impor-

tance so that the system of Federal justice may be appropriately administered."

And, as pointed out in an article in 48 **Harvard Law Review** 271, referring to prior Rule 38 of the Rules of the Supreme Court: "The crux of its meaning is in the word 'important.'"

II.

Petitioners Waived Their Right to a Jury Trial.

The Petition shows that Petitioners did not demand a jury trial until approximately three and one-half years after their suit was filed. The transcript (Petition, Exhibit A, page 14) shows that Petitioners' attorney admitted to the District Judge on May 18, 1962, that "until your Honor mentioned it" during the previous week he did not know that there had been no demand for a jury trial. It is obvious that Petitioners have seized upon the slight amendment made in the several answers filed to excuse their clear waiver of a jury by failure to comply with the provisions of Rule 38.

The cases are, of course, uniform in holding that a District Court may allow a belated jury demand, but this is entirely within the discretion of the District Judge, and a denial by him is not appealable nor subject to review or reversal in mandamus proceedings, **Petsei v. Riley**, C. A. 8 1951, 192 F. (2) 954, 955, and the holdings are to the same effect even though the failure to make a timely demand was due to neglig nce or inadvertence of former counsel, **May v. Melvin**, C. A. D. C. 1944, 141 F. 2d 22; **Scrinko v. Reading Co.**, D. C. N. J. 1954, 117 F. Supp. 603.

An examination of the amendments made in the several answers reveals that they contain the same allegations as

those contained in the answer of respondent National Dairy Products Corporation, Petition, page 43. This answer had been on file since 1959. Thus, the issues were not changed by the amendments; the issues had always been in the case, and if a jury trial were desired as to such issues a demand should have been made within 10 days of the filing of the answer above-mentioned. Moreover, the matters set forth in the amendments merely pleaded another affirmative defense. They did not, in any way, change the principal and main issues.

Once a jury trial is waived it cannot be revived by a belated amendment of the pleading touching the same general issues. In **Roth v. Hyer**, C. A. 5, 1944, 142 F. 2d 227, Cert. den. 325 U. S. 712, we find a case which is somewhat similar on the facts. There, in an action on a contract, a demand for jury trial was made. It was denied as not having been made within due time. The case was tried by the judge and judgment entered for the defendants. It was reversed, and upon again coming on for trial, defendants sought to amend their answer, and a demand for a jury trial was again filed. The judge refused to allow the amendment, and denied the jury demand. The appellate court held that the right to make such a demand is not revived by a belated amendment.

The holding of the **Roth** case, supra, is reiterated in **Moore v. United States**, C. A. 5 1952, 196 F. 2d 906, and it is there held that the Bereslawsky case, cited by Petitioners, and other similar cases, are not pertinent as the amendment in question dealt with the same general issues.

Certainly the discretion of a trial judge in denying an untimely jury demand will not be reviewed by this Court.

III.

The Amendments to the Answers Were Stricken. No New Issue Is in the Case.

Petitioners' only ground for asserting that their jury demand was timely is that it was filed within 10 days after amended answers were filed by certain Respondents. The Petition shows, page 6, that **the trial Court ordered such amended answers stricken** at the same time he denied the jury demand. Thereupon, the only issue that Petitioners could conceivably contend was new in the case went out of the case; and **is not now in the case at all.** The case is now in exactly the same posture as it was in April, 1960, when the last of the original answers was filed. If a jury trial were now granted it would result in a trial of the same issues as those which would have been tried by a jury if the Petitioners had made their request back in April, 1960. And, bearing in mind that National Dairy Products Corporation filed no amended answer, and the right to a jury trial has been expressly waived as against that Respondent, the Court would be placed in the anomalous position of either (a) attempting to try the issues as to certain Respondents by a jury while the Court itself tried the same issues without the aid of a jury, or (b) forcing National Dairy Products Corporation to go to trial before a jury because of amended pleadings filed by other Respondents over whom National Dairy Products Corporation had no control.

IV.

No Case Cited by Petitioners Sustains Their Position.

The Index to the Petition indicates that Petitioners cite five cases to sustain their contention that they are en-

titled to a jury trial. Two of the cases are, in fact, merely cited in quotations from other opinions. Each case will be considered.

In **Beacon Theatres, Inc., v. Westover**, 359 U. S. 500, no question of waiver of a jury trial was involved. In that case plaintiff filed a declaratory judgment action seeking to enjoin defendant from instituting against plaintiff any action for a violation of the antitrust laws and seeking declaratory relief. Defendant counterclaimed with a treble damage, antitrust action, and demanded a jury trial. The lower courts held that the demand was rightfully refused. This Court reversed the holding, stating that the right to a jury trial cannot be lost by a determination of the issues in connection with an equitable claim.

The second case cited by Petitioner is **Canister et al. v. Leahy**, 191 F. 2d 255, C. A. 3, 1951, cert. den. 342 U. S. 893. In that case the question of a timely jury demand is not involved. A jury trial was denied so long as the parties sought only equitable relief. Plaintiffs asked and were granted leave to file amended complaints seeking money damages instead of equitable relief. At the time the amended complaints were filed plaintiffs again demanded a jury trial. A jury trial was ordered, but the demand was later stricken, and the petition for mandamus filed. The appellate court held that the granting of a jury trial was proper. Thus, as in the **Beacon** case, supra, the holding is that a jury trial should be granted whenever a jury issue first comes into a case.

The third case cited by Petitioners is **Bereslawsky v. Kloeb**, C. A. 6, 1947, 162 F. 2d 862. That case involved an action for an injunction and accounting by reason of patent infringement. Before trial an amendment was allowed striking the prayer for equitable relief and substituting

therefor a prayer for money damages. Five days after the amendment was allowed plaintiff demanded a jury trial. A motion to strike the jury demand was thereafter granted. Mandamus was allowed ordering a jury trial. The facts and the holding are to the same effect as the two cases above considered. A belated demand was not involved.

Dimick v. Scheidt (1935), 293 U. S. 474, cited by Petitioners has no relevance whatever to the issues here involved except to recognize the importance of maintenance of the right to jury trials. The case holds only that a trial court cannot increase the amount of damages awarded by a jury as an alternative to allowing plaintiff's motion for a new trial on the ground that the damages allowed were inadequate.

The fifth, and last, case cited by Petitioners is **Ex Parte Fahey**, 332 U. S. 258. This case was an original action brought in this Court seeking an order directing a District Judge to vacate an order allowing attorneys' fees. This court held that while it had the power to issue extraordinary writs, such writs could not be used as substitutes for appeals.

It will be seen from the foregoing analysis that none of the cases cited by Petitioners sustain their position. None of them involve a belated jury demand. Petitioners' suit below does not involve an amendment substituting a prayer for money damages for one for equitable relief. As a matter of fact, as heretofore stated, the amendments upon which Petitioners base the timeliness of their jury demand were stricken, thus leaving Petitioners in exactly the same position they were years ago when their right to demand a jury expired.

CONCLUSION.

In view of the above, we respectfully submit that the Petition for Writ of Certiorari should be denied.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1962.

No. 205.

OZARK DAIRY COMPANY et al.,
Petitioners,
vs.
ADAMS DAIRY COMPANY et al.,
Respondents.

REPLY BRIEF OF PETITIONERS.

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TABLE OF CASES.

	Page
American Fidelity & Cas. Co. v. All Am. Bus Lines, 190 F. 2d 234	3
Beacon Theatres, Inc. v. Westover, 359 U. S. 500, l. c. 501, 3 L. Ed. 2nd 988, 79 C. J. 948	2, 3
Curry v. Pyramid Life Ins. Co., etc., 271 F. 2d	1
Moore et ux. v. United States, 196 F. 2d 906	3
Roth v. Hyer, C. A. 5, 1944, 142 F. 2d 227	3, 4

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1962.

No. .....

OZARK DAIRY COMPANY et al.,
Petitioners,

vs.

ADAMS DAIRY COMPANY et al.,
Respondents.

REPLY BRIEF OF PETITIONERS.

Petitioners desire to reply very briefly to the argument advanced in the brief by the respondents. The respondents have failed to answer the basic argument raised by the petitioners. The respondents state a conclusion that no important question of federal law was decided below and argue that an antitrust suit should be tried first to determine whether or not the parties are entitled to a jury trial. Such a procedure would defeat the very purpose of a mandamus proceeding to determine the right of the parties to a jury trial. If the argument of the respondents is followed to a conclusion, either party, or the court,

could obviate the right to a jury trial by simply setting aside an amendment which may have been made to one of the pleadings (albeit an important and substantial amendment). It follows therefore that the question involved is a most important one since amendments are every-day occurrences and the question arises frequently as to the right to trial by jury upon an amendment. We make bold to state and contend that irrespective of whether an amendment, such as the one in the case at bar, is withdrawn at the request of the amending party or by the court on its own initiative, that the fact remains that such procedure cannot alter the rights of the party whose rights have already attached.

The respondents have overlooked the point that the respondent, National Dairy Products Corporation, may not be in the case at the time of trial, and therefore the answer filed by this respondent would not be in the case.

Cases Cited by Respondents Are Not Applicable.

Curry v. Pyramid Life Ins. Co., etc., 271 F. 2d, page 1, was a case in which an insuror on a life insurance policy in its answer set up the affirmative defense of fraud and set up a counterclaim against the beneficiary. The beneficiary filed a reply to the counterclaim and the court held that this was the last pleading directed to the fraud issue and the beneficiary's request for a jury trial filed on the same date as the reply was timely. The court held in that case that a reply was required to the counterclaim and that this was the final pleading required or permitted. In this case, the court held that her reply, wherein she denied the fraud allegations, was the last pleading directed to such issue, hence the court argued that it must follow that her application for a jury trial was seasonably made (citing cases). The court cites with approval the case of **Beacon Theatres, Inc. v. Westover**, 359 U. S. 500 l. c.

501; 3 L. Ed. 2nd 988; 79 S. C. 948, already quoted from on page 9 of the Petition for the Writ of Certiorari. How does the Curry case, supra, help respondents?

In the case of **American Fidelity & Cas. Co. v. All Am. Bus Lines**, 190 F. 2d 234, relied on by the respondents, the court points out that the issue of bad faith on the part of the insurance company in rejecting the offer of a settlement of the action pending in the state court was squarely joined on the face of the original complaint and the original answer. The substitution of another party as the plaintiff did not change in any manner that issue or any other issue in the case. Obviously, here the facts likewise were different and do not control the present situation.

The respondents also rely upon the case of **Roth v. Hyer**, C. A. 5, 1944, 142 F. 2d 227. There is no similiarity in that case with the case at bar. In that case, the case had been tried, reversed and remanded. The suit was one at law for breach of a contract. After the case was reversed and remanded, the **defendants** offered an amendment to their answer, it being principally a denial of the authority in the attorneys who purported to settle the claim and they filed a demand for a jury trial. In other words, the **defendants in that case** offered to file an amended answer and then demand a jury trial. The situation was just the opposite of that in the case at bar, where the defendants filed amended answers raising a new issue as to each of them and the **plaintiffs** filed the demand for a jury trial.

In the case of **Moore et ux v. United States**, 196 F. 2d 906, also cited and relied on by respondents, this was a suit by the United States against one named Moore and his wife for injunctive relief and damages in relation to over-charges for rent. The case had gone to trial for rent violations before the court without a jury. No jury trial

was demanded until after remand of the case by the appellate court. Here again the amendment was made by the **defendants** who sought to allege in their amendment that the violations were not wilful, **which was already an issue in the case.** In fact, the court held, l. c. 908, that no demand for a jury trial as of right under Rule 38 had ever been made. In other words, the court merely held the general rule that the right to a jury trial when once waived cannot be revived by a belated amendment of pleadings attaching the same general issues, citing the Roth case, *supra.* By denying that the violations were wilful, the court simply held that that issue was in the first trial because the complaint prayed for three times all-over charges made.

We have no desire to re-argue the point made in the original petition that mandamus is the proper remedy and that neither the parties nor the court has a right to deny the petitioners' demand for a jury trial if and when that right arises. If it arose when all of the defendants other than the National Dairy Products Company sought to inject a new issue into the case through amendments in their answers, petitioners earnestly insist that the right to a jury trial arose at that time and the court had no power or right to deprive them of a jury trial through the device of setting aside the amendments.

The respondents have not answered the argument on page 10 of the original petition that the ruling of the Court of Appeals for the Eighth Circuit is in conflict with that of the Third Circuit, which decided the Canister case which we contend is squarely in point on the question as to what right accrues where an amended pleading is filed under Rule 38.

We recognize that the respondents are represented by able and outstanding counsel. Nevertheless, we submit

that they have not effectively answered the arguments set out in the briefs filed by the petitioners for the obvious reason that the petitioners are entitled to a jury trial under the facts and the law, as provided by Rule 38 of the Federal Rules of Civil Procedure.

For the reasons set out in the petitioners' original petition and in this reply brief, petitioners pray the Court that the ruling of the Court of Appeals be reversed.

Respectfully submitted,

.....

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.....

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